SUPREME COURT, U. S. No. 4956
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In The

SUPREME COURT OF THE UNITED STATES

October Term 1967

TINA DEAL, a minor, by FRANK L. DEAL, her father and next friend, et al.,

Petitioners,

vs.

THE CINCINNATI BOARD OF EDUCATION, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In The

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October Term 1966

No. 1358

TINA DEAL, a minor, by FRANK L. DEAL, her father and next friend, et al.,

Petitioners,

vs.

THE CINCINNATI BOARD OF EDUCATION, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JURISDICTION

This cause is not ripe for appeal because it has been remanded to the United States District Court for the Southern District of Ohio, Western Division, for further proceedings which could make for question raised through this petition a moot question. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is not in conflict with other circuits.

QUESTIONS PRESENTED

1. Is there a constitutional duty on Cincinnati Public School officials to balance the racial composition of the Cincinnati Public Schools because the Negro pupil popu-

lation is not uniformly distributed throughout the Cincinnati Public School System, when there is no showing of deliberate discrimination or racial classification?

2. Should the United States Supreme Court consider question No. 1 while the cause is on remand from the Court of Appeals to the District Court for proceedings to determine whether or not the Cincinnati Public Schools have brought about racial imbalance through gerrymandering, have deprived Negro children of equal educational opportunities, or have discriminated against Negroes in the hiring and assignment of teachers?

STATEMENT

The record in this case is voluminous. It includes a lengthy printed stipulation, 286 joint documentary exhibits, and 777 pages of transcript. It nonetheless can be summarized in two paragraphs:

(1) The Cincinnati Public School System includes a number of schools which are attended almost entirely by Negro pupils, a number of schools attended entirely by white pupils, and a number of schools attended by both Negro and white pupils in various percentages of each of the races; the racial composition of each school is simply the result of the racial composition of the neighborhoods which they serve.

(2) A professor of education from Antioch College and a professor of Sociology from Washington University, St. Louis, both expressed the opinion that "a racially unbalanced school seriously affects a child's ability to learn."

The record is clear that there has been an irregular shift of populations in Cincinnati in recent years. This has caused many predominently white and racially balanced schools to become all Negro in a period of two or three

years, even though the school attendance boundry lines remained substantially unchanged.

The District Court made a finding that there was insufficient evidence to show that racial imbalance in some of the schools was caused by unlawful action of the respondents. The District Court failed to make findings on the question of educational harm and discriminatory practices with regard to the employment and assignment of teachers. The case was remanded to the District Court for further proceedings on the question of whether or not unlawful action of the respondents caused the present racial composition of the Cincinnati Public Schools, on the question of educational harm, and on the question of discriminatory practices in the employment and assignment of teachers.

The United States Court of Appeals decided that if there were no concurrent unlawful action on the part of the Cincinnati Public Schools, the mere fact alone that some schools were predominantly Negro does not create a constitutional duty to balance the races.

The record is clear that in the seventy-eight years since segregation was abolished in Ohio in 1887 [84 *Ohio Laws* 34; *Board of Education* v. *State,* 45 Ohio St. 555, 16 N.E. 373 (1888)] Negro students have attended the neighborhood schools in Cincinnati on the same basis as white students. The Cincinnati Public Schools have always operated under what is commonly referred to as the "neighborhood plan," which is provided for by the *Ohio Revised Code,* Sec. 3313.48, which provides:

> "The board of education of each city, exempted village, and local school district shall provide for the free education of the youth of school age within the district under its jurisdiction, *at such places as will be most convenient for the attendance of the largest number thereof.*" (emphasis supplied)

The Cincinnati Board of Education considered the question of racial imbalance and adopted a policy with regard to racial imbalance as enumerated in stipulation 11:

> 11. *Defendants' policy statement*: On the 9th day of March, 1964, the defendants agreed to a policy as a guide to officers and employees of the Board in selection of sites for schools, establishment of attendance area boundary lines and assignment of pupils. This policy is as follows:
>
> (1) As a matter of policy, the Board would like to avoid predominantly Negro schools to the extent that the Board has any control over the causes which create such predominance. But in exercising any control in this area the Board will not deviate from the long-established neighborhood school plan or the requirements of Sec. 3313.48 R.C. that schools be located where they will be most convenient for the largest number of students.
>
> The Board is willing to make race of students one of the elements to be considered in the establishment of school attendance zone lines so long as this can be done consistently with the neighborhood school policy, the requirements of Sec. 3313.48, and the numerous factors which have always been considered in establishing such zone lines — safety of children, travel distance and capacity of schools.
>
> (2) The Board does not accept the concept of de facto segregation and will not agree to any proposal to bus students, to transfer classes or any other program to attempt to balance races as such.

ARGUMENT

1. Is there a Constitutional Duty on Cincinnati Public School Officials to Balance the Racial Composition of the Cincinnati Public Schools Because the Negro Pupil Population Is Not Uniformly Distributed throughout the Cincinnati Public School System, Where There Is No Showing of Deliberate Discrimination or Racial Classification?

The United States Court of Appeals made reference to *Cross* v. *Board of Education,* 373 U.S. 683, 687 (1963), and based its analysis upon the premise that a racial classification as such is "obviously irrelevant and invidious" and thus is unlawful. The showing of a racial classification would not require a showing of harm in order to sustain the remedy under the United States Constitution.

With the foregoing premise, the Court of Appeals joined every other Court of Appeals that has considered the problem of so-called *de facto* segregation and agreed that a neighborhood school policy conscientiously administered without manipulation to deliberately separate students of different races, does not constitute the violation of the constitutional rights of students, even though some schools in a school system which follows a neighborhood school policy may have pupil populations entirely composed of students of one race or the other. *Bell* v. *School City of Gary, Ind.,* 324 F.2d 209 (CCA 7th, 1963), cert. den. 377 U.S. 924, 84 S. Ct. 1223, 12 L. Ed.2d 1216; *Downs* v. *Board of Education of Kansas City,* 336 F.2d 988 (CCA 10th, 1964). In Brown II, the constitutionality of the neighborhood policy was adverted to as follows:

> To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and at-

> tendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis and revision of local laws and regulations which may be necessary in solving the foregoing problems. *Brown* v. *Board of Education*, 349 U.S. 294, 300-301.

A number of other courts have arrived at the same conclusion as the Sixth Circuit:

Lynch v. *Kenston School District*, 229 F. Supp. 740 (N.D. Ohio 1964), app. dismissed July 2, 1965; *Craggett* v. *Board of Education of Cleveland*, 234 F. Supp. 381, 386 (N.D. Ohio 1964); *Avery* v. *Wichita Falls Independent School District*, 241 F.2d 230, 233 (CCA 5th, 1957); *Boson* v. *Rippy*, 285 F.2d 43, 45-46 (CCA 5th, 1960); *Kelly* v. *Board of Education of the City of Nashville*, 270 F.2d 209, 226 (CCA 6th); *Briggs* v. *Elliott*, 132 F. Supp. 776, 777 (EDSC, 1955).

There is tremendous pressure to push the 14th Amendment into areas that properly should be the subject of legislation and administrative action. This problem was confronted by Professor Paul A. Freund of the Harvard Law School in his article "Civil Rights and the Limits of Law," 14 *Buffalo L. Rev.* 199 (1964). Professor Freund made reference to the rejection of efforts to push the Fourteenth Amendment further in the involvement in public accommodations, and wrote in part:

> Those who argue that the Fourteenth Amendment, in and of itself, applies or should apply to the places of public accommodation do so partly because they see in the Fourteenth Amendment the most appropriate source of moral strength. But I believe they overlook some institutional considerations of importance. If we were to use the Fourteenth Amendment directly without the intervention of an act of Congress, as some members of the Court wished to do last June,

there would have been all kinds of unresolved questions of the range of application of the Fourteenth Amendment: not merely in racial discrimination, for the Fourteenth Amendment is far broader than that, but in other forms of equal protection, nepotism in business, for example, in the concept of due process of law applied, for instance, to the conduct of stockholder meetings, or labor union meetings. All of these would potentially be Federal Constitutional questions to be resolved by authoritative decisions overrulable by constitutional amendment, but surely lacking in that sense of tentativeness, of experimentation, of progressivism, of flexibility, that are the hallmarks of statutory or common law development as distinguished from constitutional adjudication. And so I for one welcome the fact that the Court did not see fit last June to decide the cases on sit-ins in places of public accommodation on grounds of the Fourteenth Amendment per se. The choice of institutional means pointed in the direction of the more flexible and ad hoc approach. 14 *Buffalo L. Rev.* 199, 203-204.

He extended this analysis to the problem of so-called "de facto" segregation and urged the courts not to get involved in the creation of affirmative programs to balance races through constitutional law:

Still a legislature or a school board ought to be able to take account of the facts of segregation in the interest of promoting long-run *de facto* desegregation, which is surely a legitimate aim. This is the position taken by both the New York Court of Appeals and the New Jersey Supreme Court, there being no issue in the case of requiring integration constitutionally but only of *permitting the race factor to be taken into account by a school board disposed to do so,* without violating the abstract principle of color-blindness. This is a question of *educational and social policy,* a *choice of means to a legitimate end,* the encouragement of desegregation, as segregation itself would be an illegiti-

> mate end. There the matter rests, and in my judgment, is likely to rest so far as constitutional law is concerned. 14 *Buffalo L. Rev.* 199, 205. (Emphasis added)

The petitioners claim that the decision of the Sixth Circuit is in conflict with other circuits. This assertion is not sustained by an examination of the opinions they cite. They place heavy reliance upon the case of *United States* v. *Jefferson County Board of Education,* 372 F.2d 836 (CCA 5th, 1966). This case is clearly not in conflict with the decisions on *de facto* segregation because the United States Court of Appeals for the Fifth Circuit states forthrightly:

> In this circuit, the school problem arises from state action. This circuit has not had to deal with non-racially motivated *de facto* segregation, that is, racial imbalance resulting fortuitously in a school system based on a single neighborhood school serving all white and Negro children in a certain attendance area or neighborhood. 372 F.2d 836, 852.

The same fact is true in regard to *Board of Education* v. *Dowell,* — F.2d — (CCA 10th, 1967).

The petitioners also rely upon the decision of the First Circuit in *Springfield School Committee* v. *Barksdale,* 348 F. (2d) 261 (CAA 1, 1965) to show conflict among the circuits. The specific holding of this case was that the judgment of the district court was premature because it failed to allow the administrative body concerned (Springfield School Committee) to deal with the racial composition of the schools in accordance with an announced policy to minimize the amount of racial separation in the school system. This decision did not compel the balancing of races in the absence of the showing of state action to cause the separation of races. Indeed, the First Circuit reversed such an order issued by the district court. In essence, the

First Circuit agreed with Professor Freund's analysis that the problem of racial imbalance in the public schools should be left to the trial and error procedures of legislation and administrative decision-making.

There is no United States Circuit Court which has held that racial imbalance caused by forces completely outside the control of the school board in a large northern city imposes a constitutional duty upon the school board to balance the races within the school system. Thus, there is no conflict among the circuit courts with regard to the holding of the Sixth Circuit in this case.

2. Should the United States Supreme Court Consider Question No. 1 While the Cause Is on Remand from the Court of Appeals to the District Court for Proceedings to Determine Whether or Not the Cincinnati Public Schools Have Brought About Racial Imbalance through Gerrymandering, Have Deprived Negro Children of Equal Educational Opportunities, or Have Discriminated against Negroes in the Hiring and Assignment of Teachers?

This case is not now ripe for review because it has been remanded to the District Court for further proceedings which may make moot the question raised by the petitioners. The Court of Appeals found that the District Court's findings of fact were not sufficient to support its conclusion that the plaintiffs failed to sustain their burden of proof with regard to intentional action to cause racial imbalance, such as gerrymandering, deprivation of equal educational opportunities, and discrimination in the hiring and assignment of teachers. For this reason the case has been remanded to the District Court for further proceedings on these issues. The petitioners make reference to the statement of the Court of Appeals contained in 15a-16a of the petitioners' petition:

> We have stated above that a showing of impairment of a Negro student's capacity to learn, arising from his school's racial imbalance, does not, standing alone, make out a case of constitutional deprivation. Evidence of such harm, however, may indeed be relevant to the issues of the case before us. Appellants offered expert evidence on this subject. The School Board offered no opposing expert testimony, no doubt because the Court granted the Board's motion to dismiss, made at the close of plaintiffs' proofs. Our review would be helped by finding as to whether the District Judge considered plaintiffs' expert testimony of such relevance, weight or probative value as to make an issue calling for rebuttal proof by defendant.

Since this matter of impairment of the student's ability to learn has been remanded to the district court for further proceedings, contrary to the assertions of petitioners at pages 10-13 of their petition, this issue would be subject to further review by the Sixth Circuit Court of Appeals and subject to a later Petition for a Writ of Certiorari.

If this Writ of Certiorari were granted, the United States Supreme Court would be asked to hold, contrary to those circuit courts which have considered the question, that there is a constitutional duty to balance races in those situations where a racial imbalance has arisen as the result of factors not under the control of a school board, without a determination of whether or not there has been gerrymandering, without a determintaion of whether or not there has been educational harm, and without a determination as to whether or not there has been discrimination against Negroes in the hiring and assignment of teachers. This petition is made even though a determination of the issues that have not yet been determined in this case might make this question moot.

CONCLUSION

Wherefore, the respondents request that the petition for a writ of certiorari be overruled.

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APPENDIX

In the

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CIVIL ACTION NO. 5483

TINA DEAL, a minor, by Frank L. Deal, her father and next friend, et al.

Plaintiffs

v.

THE CINCINNATI BOARD OF EDUCATION, et al.

Defendants

OPINION

(Filed July 26, 1965)

Robert L. Carter, Barbara A. Morris, Lewis M. Steel, New York City, Norris Muldrow, Calvin C. Johnson, Cincinnati, Ohio, for plaintiffs.

William A. McClain, City Sol., Philip S. Olinger, Asst. City Sol., C. R. Beirne, Special Counsel for Cincinnati Board of Education, Robert E. Manley, Cincinnati, Ohio, for defendants.

PECK, J.: This is a class action brought by Negro children through their parents and next friends complaining of alleged racial imbalance in Cincinnati public schools.

After repeated informal and pretrial conferences between the Court and counsel, numerous hearings on preliminary motions (including one for summary judgment), and unusually exhaustive discovery procedures, this case came on for trial. Prior thereto plaintiffs had been unsure as to which experts they would call and what areas would be covered by their testimony and trial was entered into under an agreement providing that plaintiffs would present their entire case, defendants would present their entire case except for responsive expert testimony, whereupon trial would be continued to an agreed date at which later time defendants' experts' testimony and plaintiffs' rebuttal would be received.

At the conclusion of plaintiffs' case, defendants moved for judgment, and it is that motion which is presently under consideration. Upon its making, the motion was extensively argued orally, and has since been thoroughly briefed by counsel. Subsequent to that oral argument, and in accordance with the previous agreement, defendants presented their "factual" case (i.e., their entire case except for expert testimony), but nothing contained therein is before the Court for purposes of the present motion and will not hereinafter be taken into account.

The Amended Complaint lists as plaintiffs 96 (including 52 intervenors) "minor citizens of the State of Ohio," suing through their parents and next friends "on their own behalf and on behalf of thousands of [other] Negro minors within the school district of Cincinnati, who are similarly situated because of race and color." The Cincinnati Board of Education, its superintendent and the individual members of the Board are named defendants. For present purposes, the eleven paragraphs of the prayer of the Amended Complaint may be fairly summarized by setting forth one of them:

"(3) That defendants be further enjoined from operating and providing racially segregated public schools, assigning plaintiffs, and the members of the class they represent, to racially segregated schools, and seeking to further extend existing patterns of racial segregation."

The Amended Answer to the Amended Complaint permitted to be filed over plaintiffs' objections at trial (Transcript of Proceedings [hereinafter designated by "T."] 5-6; T. 325) "generally" denies the essential allegations of the Amended Complaint, specifically denies that plaintiffs have suffered damage, injury or irreparable harm or that they have any real interest in this action, and avers that the "real party in interest is the National Association for the Advancement of Colored People, which is responsible for the commencement of this action and has maintained and controlled it on behalf of the plaintiffs since its commencement[1];" denies any "good faith" effort to negotiate the

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[1] The record of appearances of counsel indicates that the only attorneys initially involved on the part of plaintiffs were those resident in Cincinnati (Messrs. Muldrow and Johnson). Subsequently Miss Barbara A. Morris of New York City entered an appearance on behalf of plaintiffs and participated in some preliminary matters but not at trial, and Messrs. Carter and Steel of New York City entered appearances and participated at trial with Mr. Muldrow. The following colloquy concerning representation occurred (T. 373):

"MR. CARTER: . . . If I might say, I am sorry for the misunderstanding the Court had. We, of course, are counsel for the National Association for the Advancement of Colored People, Mr. Steel and myself, but before this Court at all times we were representing the plaintiffs in this action, and not the organization. I am sorry the Court didn't understand that.

"THE COURT: Mr. Carter, on that subject, on April 9th of this year, Mr. Steel indicated that this case was better prepared, and would be more fully presented because the National Association for the Advancement of Colored People had more personnel and more money available for the preparation of this case than had been true in the preparation of other cases."

Subsequently (T. 374) Mr. Steel stated "As Mr. Carter did indicate,

issues on the part of plaintiffs, while averring such negotiation by defendants; and denies the jurisdictional right of this court to consider the issues presented in this action because of the failure of plaintiffs to exhaust their administrative remedies under Ohio law.

From the time of our earliest contact with this case an earnest effort has been made to elicit from counsel an agreed statement of the issue[s] and to cause the case to be placed in posture for submission by stipulation supplemented by expert testimony.[2] Some indication of the difficulties encountered in attempting to define the issues and eliminate superflous testimony is indicated from the following statement contained in our Memorandum Opin-

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we naturally are employed by the NAACP, and the NAACP also handles other cases, so that I am — the attorneys for the NAACP are also attorneys for plaintiffs in other cases."

It seems proper to add that on the other side of the table the City Solicitor of Cincinnati, who personally participated throughout the proceedings, found it necessary to secure additional attorneys to aid him and his assistants in defending the action. C. R. Beirne, who acted as chief trial counsel for the defendants, and Robert E. Manley were employed for this purpose.

The net result has been that the Court has had the benefit of an unusually thorough presentation: e.g., the briefs for and against the present motion alone total 101 pages without appendices.

[2] Receipt of such testimony was vigorously resisted by defendants, and while expert testimony has been received in other cases of this nature (See, e.g., *Northcross* v. *Board of Education*, 333 F.2d 661 (6th Cir. 1964), cert. denied, 370 U.S. 944 (1964); *Kelley* v. *Board of Education*, 270 F.2d 209 (6th Cir. 1959), cert. denied, 361 U.S. 924 (1959); *Dowell* v. *School Board*, 219 F. Supp. 427 (W.D. Okla. 1963); *Blocker* v. *Board of Education*, 226 F. Supp. 208 (E.D. N.Y. 1964); *Barksdale* v. *Springfield School Committee*, 237 F. Supp. 543 (D.C. Mass.), rev'd. —— F.2d —— (1st Cir. 1965); *Bell* v. *School City of Gary, Indiana*, 213 F. Supp. 819 (N.D. Ind.), aff'd, 324 F.2d 209 (7th Cir), cert. denied, 377 U.S. 924 (1963)), no reported case indicates such an objection or the ruling thereon. In the absence of controlling authority, the Court here took the position throughout that objection to such testimony went rather to the weight than to the admissibility of the testimony (e.g., T. 318, 322, 325 and 352), and overruled the objections.

ion filed March 9th, 1965, disposing of defendants' Motion for Summary Judgment:

> "[T]he motion will be overruled on the narrow ground that defendants have failed to establish that there is no genuine issue as to any material fact which can be satisfactorily isolated from the whole of the rambling, rhetorical Amended Complaint.
>
> "This is not to say, however, that we are in agreement with plaintiffs' further argument that this conglomeration of allegations constitutes a 'one-count' cause of action. We cannot agree with this because in spite of the many, many hours that have been spent in hearings, conferences with counsel and in reviewing the myriad pleadings, motions, answers to interrogatories, objections, exceptions, depositions and exhibits (with an aggregate bulk of many pounds) we have yet to be advised as to what that 'one-count' is. A comment from our Memorandum Opinion of August 4th, 1964, is as appropriate now as it was then:
>
> > " 'As a matter of fact, even at this late date in this action which has consumed countless hours of the time of all concerned the issues continue to be clouded and obscure.'
>
> "In view of the proximity of the pretrial conference, it seems pointless to here comment further on the difficulties which have been encountered in attempting to get this cause squarely at issue. Counsel have been asked time after time what single fact in this entire matter is not readily capable of stipulation, but no affirmative response has ever been made."

Monumental effort on the part of counsel did, in fact, result in great progress in the area of stipulation, and at the time of the pretrial conference April 9, 1965, it appeared probable that the entire factual presentation could be so presented. However, counsel for plaintiffs then advised that in addition to the stipulations and expert

testimony, they proposed to call the individual defendants and various employees of the Board of Education as on cross-examinaton. We immediately advised that while no doubt existed as to their right (as distinguished from advisability of doing so) to call parties as on cross-examination, in the absence of clear authority employees other than managing agents could not be so called.[3] At that conference we ineffectively suggested that from plaintiffs' point of view stipulations could not reasonably be expected to be strengthened by cross-examinations of the Board's members and its superintendent, and that explanations weakening the stipulations might well be forthcoming. Parenthetically, we offer the comment that the latter did in fact occur.

The question of the right of plaintiffs to call Board employees not parties hereto as on cross-examination was raised squarely when plaintiffs called one John Shreve (then not otherwise identified). The record reflects the following (T. 217B-219):

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[3] T. 255-257 "THE COURT: It will be sustained.

"Mr. Steel, in view of your indication of surprise, and the Court's ruling yesterday, it might be helpful to recall to counsel's mind the pretrial conference held on April 19th. At that time I said to you and Mr. Muldrow, 'I would like to whatever extent we can get this cross-examination thing clear.

" 'I recognize of course there is no question about the right to call parties on cross-examination, but included in the draft of the pretrial statement that went out was a statement that only those witnesses would be called on cross-examination whom you had a right to so call, and it raises a legal point.

" 'As a general rule where you have a corporate defendant only a person in a managing capacity can be called as on cross-examination. How that rule applies to a public entity I do not know. My very, very frank feeling is that the rule should be much more narrowly construed as to a public entity because of the nature of the people involved.

" 'You are talking here about public servants who are not employees of a corporation for profit, and I do not think that the personnel of a board of education in the absence of some pretty clear authority

"JOHN SHREVE

"called as a witness by Plaintiffs, being first duly sworn, was examined and testified as follows:

"MR. STEEL: Your Honor, I call Mr. Shreve as an adverse witness under Rule 43 (b).

"THE COURT: That will be denied.

"MR. STEEL: Excuse me, Your Honor.

"THE COURT: That request will be denied.

"MR. STEEL: Can I have the basis of that ruling, Your Honor?

"THE COURT: Yes, you may.

"The basis of the ruling is that 43 (b), of the Federal Rules of Civil Procedure, provides that: 'a party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or pri-

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are available for call as on cross-examination. That's what I meant at our session here last time on March 11.'

"Then there were some exchanges in which both yourself and Mr. Muldrow participated, and subsequently, after making reference to Rule 43(b) you said: 'I think the rule is there to make sure that parties have the right to call adverse witnesses —'

"I interrupted to say, 'Mr. Steel, that is exactly the point. These are not adverse witnesses. These are public servants. That is exactly the point.'

" 'MR. STEEL: But they could be expected — they would because of their loyalty and because of their job — to testify in the interest of their employer.'

" 'THE COURT: I will never recognize that. I will never recognize that any public servant can be put in that category. Once you get a showing of hostility that is an entirely different matter. Then you have the right to move to cross-examine on the basis of hostility or surprise. But that is exactly what I was talking about when I said I do not think you can compare a public servant to an employee of a private corporation for profit.'

"Mr. Steel, that's the transcript of that hearing. I submit to you, sir, that it is exactly the same statement, in respect, that I made from this bench yesterday afternoon. I can see no conceivable reason for your claim of surprise in view of that transcript."

vate corporation,' and so forth, as on cross-examination.

"It is the holding of this Court that this witness at this time does not fall within any of the permissive portions of that rule to permit his cross-examination by counsel for the Plaintiff.

"MR. STEEL: Your Honor, I note an objection to that ruling, and urge the arguments that I made in my pretrial brief.

"THE COURT: For the further information of counsel I will make this additional explanation as I did to counsel at the time of the last pretrial conference.

"I would in any event with reference to a private corporation not at this stage of the proceedings, permit the calling of this witness as on cross-examination, on the ground that he is not a managing agent.

"However, I further point out, as I did to counsel on the record in the pre-trial conference that we are here dealing not with persons who are employed in a private capacity, but we are dealing with public servants. I take no offense at being called idealistic, if you care to do that, but I have enough idealism to be absolutely convinced, until the contrary is shown, that public servants are just exactly what is connoted by that term. They are serving the public, not an individual master. When as and if this witness, or any other witness called by any party demonstrates hostility, I need hardly say to you that a motion for the right to cross-examine may be made. And until that time occurs, as indicated, the request will be denied."

Shreve's subsequent testimony established him as an assistant superintendent in the Cincinnati school system in the department of special services. However, plaintiffs had themselves already elicited from Wendell Pierce, Superintendent of Schools, the fact that the responsibility for de-

cisions within the school system was his alone and that such responsibility was neither delegated to nor shared by assistant superintendents (T. 130-131). In fact, under Ohio law a superintendent must so assume full responsibility (O.R.C. § 3319.01), and can neither so delegate nor share. The authorities cited by plaintiffs in contending for their right to cross-examine such witnesses are not in point.[4] Plaintiffs then further preserved their record on this point by offering to call three other specified assistant superintendents as "adverse witnesses under Rule 43 (b)" and taking exceptions to the denial of such right. (T. 260-263).

One further comment in this general regard seems proper. After the Court's refusal to permit plaintiffs to cross-examine Mr. Shreve, they proceeded through a rather extensive direct examination of him, followed by a thorough cross-examination by defendants. Since plaintiffs had thus made Mr. Shreve their witness, we would be justified in considering them to be bound by his testimony, and adop-

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[4] T. 259-260: "THE COURT: The record will indicate [your objection].

"I will make this comment, as briefly as I can, Mr. Steel.

"First, none of the authorities which have been cited are in any way controlling on this Court, the cases to which reference has been made dealing with public authorities.

"Second, the case and line of cases on which you have principally relied, which I understand to be exemplified by *Newark Insurance Company* v. *Saratain*, 20 F. R. D. 583, are in no way applicable to the present situation, and are thoroughly distinguishable on the facts.

"Finally, and most basically, this is the ground on which we rely primarily, it has not been shown as was stated in the course of the Court's ruling yesterday that this witness is a managing agent under the contemplation of Rule 43(b).

"You have made reference to Dr. Pierce's testimony. I call to counsel's attention that you elicited from that witness the fact that the responsibility as a matter of both fact and law remained with him.

"In view of that fact, it cannot be said that this witness is clothed with the authority of a managing agent as that phrase is used in the rules."

tion of such a position would be fully fatal to plaintiffs' cause. Such position is not here adopted.

One other evidentiary area was denied plaintiffs, and once again the record reflects a ruling consistent with the position indicated by the Court during early conferences. Plaintiffs called one Dean Clark, a relocation representative for Urban Redevelopment in the employment of the City of Cincinnati (The City is not, of course, a party to this action.). In fifteen pages of testimony (T. 263 et seq.) Mrs. Clark outlined her duties in assisting persons dispossessed under Urban Redevelopment programs in obtaining new housing. She then identified (T. 278) a proffered exhibit as "a listing from an investment corporation of both White and non-White vacancies in the city." Following objection to the exhibit, the following colloquy appears; it is quoted at length because both plaintiffs' and the Court's positions are reflected (T. 279-287):

> "THE COURT: How does it become material, Mr. Muldrow?
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> "MR. MULDROW: It becomes material, sir, from the viewpoint of Negroes being segregated in public housing by public officials.
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> * * * * *
>
> "THE COURT: The only public officials named in this suit are members of the Cincinnati Board of Education, and the Board. Even conceding that there may have been improper action taken by the City of Cincinnati, or the governor of Arizona, or some other public authority, how do we here become concerned with that?
>
> "MR MULDROW: We become concerned, Your Honor, because the Board of Education is a public body, and the City of Cincinnati is a public body, being a part of the State of Ohio. And here we have

state action which is practicing segregation upon Negroes, and in that respect it is pertinent to the question of whether or not Negroes are segregated in the Cincinnati Public School System, and whether or not they are receiving equal educational opportunities.

"THE COURT: Mr. Muldrow, how could any order that might issue from this Court be binding on any person, private or public, who is not a party to this action and has not had an opportunity to respond, in either a public or private capacity?

"MR. MULDROW: Our position, Your Honor, on that particular question is that we have before this Court an agency of the state, the Cincinnati Board of Education, which is segregating against Negro children; and further that Negro children are segregated in housing, and that one part of the state cannot segregate, which will affect another part.

"THE COURT: Mr. Muldrow, I don't want to debate with you what some other agency may or may not do. I am only asking how this Court is empowered to take any action with reference to any individual, private or public, who is not a party to this lawsuit?

"MR. MULDROW: The action would be taken against the Cincinnati Board of Education, because we are saying the fact that even though another agency might discriminate, as far as in housing, that this could not be used as a scapegoat for the Cincinnati Board of Education furnishing equal educational opportunity to Negro children.

"The Cincinnati Board has to adjust to segregated housing in order to make equal educational opportunities available to all of its citizens.

"Therefore, an order would be directed to the Cincinnati Board of Education to correct whatever segregation is practiced upon Negro children, even though it might be brought about by another agency. But the Board has to deal with education, and seg-

regated housing affects education. And this is the question, that you cannot get an equal educational opportunity by being confined or restricted to a particular section, and that the Board has power, or can do something about it to correct that segregation.

* * * * *

"THE COURT: Mr. Carter, in the one or two sessions which you have helpfully participated in, the pre-trial conferences, you contributed very substantially to the forwarding of this matter. The Court stated to you then that while it was all very well to discuss many of the problems that arose in surrounding areas, that unless some disposition could be made on an amicable basis, if this matter proceeded to trial in an action in which you are seeking the extraordinary relief of injunction, we would find ourselves in a situation where we would be bound by the rules of such a procedure.

"If you care to offer anything on the question I have asked Mr. Muldrow, I would be pleased to hear it.

"MR. CARTER: I would, if it please the Court.

"What is being attempted to elicit from this witness is the fact that in a city agency relocating families, that the — in the assistance in relocating families that the agency uses as a part of its information for relocation, lists in which properties are restricted on the basis of race, in assisting persons in finding houses.

"Now, this we think — we think, Your Honor, that this is a part of — we are attempting to show to the Court in some measure the participation of a public agency, not the Board of Education, but another public agency, in the residential segregation which exists in the City of Cincinnati, and * * * on the basis of which the School Board indicates that this is reason, because of housing segregation, geographical segregation, is the reason for the maintenance of the schools which we say are segregated schools.

"Now, it is true, of course, that the Court will not — need not make an inference on the basis of that, that this is a responsibility of the Board of Education. But our view of it is that this is a part of the picture which we think the Court should see and should view and should understand in coming to its conclusion in regard to whether this is or is not a violation of the Fourteenth Amendment; and for these reasons we are attempting to elicit from the witness the procedure in regard to relocation. I understand this witness doesn't go out * * * and find houses, but we are attempting to establish that as part of the process a restricted list is used and is made available to the persons who are relocated by the city, which we think adds to segregation.

"This is the purpose or the intent of this testimony.

"THE COURT: Mr. Carter, the difference between us, and the point that I was attempting to make a few moments ago, is that I fail to see how it becomes material and proper evidence in this case to indicate transgressions or wrongdoings that may have been perpetrated by some other individual or agency.

"For example, I think it might be even entirely arguable that the actions of the governor of Alabama may have had some influence on some people in this district. We recently had within the Southern District of Ohio a national meeting of the Ku-Klux Klan. I am sure that you would not suggest that any evidence with reference to that matter could be brought into this courtroom.

"I strongly suggest to you, gentlemen, that the difference is only one of degree. You are picking an agency of the City of Cincinnati, which is entirely separate legally and factually from the individual Defendants, as well as the defendant entity of the Board in this case.

"I suggest that the fact that there is some geographical proximity does not mean there is any reason for permitting whatever this lady's agency may or may not have done improperly come into case.

"MR. CARTER: Your Honor, * * * we are not attempting to put Mrs. Clark on trial as a defendant. What we are really attempting to do for the Court was to elicit from her some facts in regard to the relocations of persons, which we think would add to the Court's understanding and knowledge of the problem. We think that the problem, that part of the problem — and I think that it is going to be demonstrated, or that the Defendants are going to say that the problem is not any direct action that they do, but the problem is * * * basically one of segregated housing.

"THE COURT: Mr. Carter, we are exactly back to where we started. I am referring to the statement that I made to you when you were first in Cincinnati a year or so ago, that if we are in an injunctive proceeding we must be bound by the rules controlling an injunctive proceeding in the United States District Court. That does not in my conception extend to embracing and hearing the transgressions by agencies other than those named in the complaint.

"MR. CARTER: I understand that, Your Honor, but I understood that Your Honor had indicated that to me at the time, that by bringing in other people, that we were bound by the rules. Of course, we recognize that. However, it is my feeling in terms of the whole evidence of what produces, or what causes or what is the basis of what we call segregated schooling here, that this is part of the evidentiary facts which we think we should present to the Court. And particularly we think it is a part of the evidentiary fact, that a part of this is produced by an agency of the City of Cincinnati.

"We respectfully submit that this isn't the same case as the governor of Alabama. I think that the governor of Alabama's action, or the Ku-Klux Klan is more tenuous action. We think here we have a direct agency involved, which is a public agency in the same city as the School Board, which helps create this situation. And this is the reason we want this evidence in.

"THE COURT: Gentlemen, I permitted this to be gone into a little more fully at this time than might otherwise be justified, but I wanted the counsel to understand the Court's position. I think that I understand your position.

"The objection to the Plaintiff's Exhibit Number 1 for identification at the present time will be sustained, subject to the right of the Plaintiffs to reoffer the exhibit when and if it is shown to have some connection with the Defendants in this case."

It is here held that in an action against a board of education charging segregation or failure to desegregate pupils in the school system such board is in no way responsible for action taken or omitted by other public or private agencies or entities and that evidence thereof is not admissible in such action. On that ground the denial of admissibility of the Clark exhibit is reaffirmed and similar reaffirmance is made of other rulings at trial concerning evidence proffered as to actions taken or omitted by non-parties hereto on the same basis.

The conferences referred to in the colloquy between Mr. Carter and the Court occurred before the case was even technically at issue, and at a time when settlement of the issues between the parties, aided as they have been throughout by capable and cooperative counsel on both sides of the table, appeared entirely possible. At that

time areas of discussion were entered into in chambers (and, we were given to understand, even more extensively at conferences in which we did not participate), and this was the reason for our cautioning comment. We conceive any subject to be a proper one for discussion during negotiation that might lead toward settlement of any lawsuit, but that is far from saying that evidence thereof is necessarily admissible. As we have repeatedly attempted to point out, that is particularly true in a case (1) involving broad social concepts (2) in which the extraordinary remedy of injunctive relief is sought. In our considered judgment it is far too easy to be led down the primrose path of platitudes and generalities when discussing such social evils as are claimed to underlie the present cause, and to forget that that path must end at the courtroom door. Once that threshold is crossed, a forum has been entered in which a plaintiff must clearly prove his case if he is to be afforded the extraordinary relief he seeks in a court of equity. (*Goldammer* v. *Fay,* 326 F.2d 268, 270 (10th Cir. 1964); *Allen* v. *Pyrene Mfg. Co.,* 111 F. Supp. 819 (D.N.J. 1953); 43 C. J. S. *Injunctions,* section 192 (1955); 28 Am. Jur. *Injunctions,* section 25 (1959)).[5]

Turning, then, from the temptation to let sympathy

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[5] On a previous occasion we expressed that thought in this manner (Memorandum Opinion filed August 4, 1964):

> "At the request of the attorneys for the parties to the action, on two occasions conferences have been held in chambers with all representatives present and general discussions have been held. Necessarily and appropriately these discussions have gone into subject matters concerning which we have no official power to act, but the doors of our offices will always remain open if all concerned are of the opinion that our participation may be of any assistance. However, when we move from the conference table to the court room we regress to the narrow limits established by the pleadings and it is for that reason that emphasis is placed on the urgent need for a clarification of those issues."

substitute for testimony and perhaps to let inclination prevail over precedent, and having examined what plaintiffs have *not* been able to establish, let us examine what they have in fact established on the record.

At the opening of trial, an agreed and executed stipulation was received in evidence, as were 249 exhibits detailed in it. That Stipulation is a meticulously prepared document consisting of 71 pages, exclusive of 24 pages of carefully arranged Contents and lists of exhibits. Without this document, and the agreements as to exhibits, presentation of plaintiffs' case alone could well have extended over weeks (if not months) instead of days, and appreciation is expressed for the effort and cooperation of counsel in this achievement. While the parties agree that the 72 separate stipulations are factually accurate, defendants have objected to 49 of them as irrelevant and immaterial, and plaintiffs to one on the same grounds. While these objections in many instances have substantial merit, at this stage of the proceedings it is felt that having all of this material in the record may be of present or future assistance and all of the objections are accordingly overruled.

The record before us establishes the existence of a Cincinnati school system organized on what is known as a 6-3-3 basis; i.e., the elementary schools consist generally of kindergarten and grades 1 through 6, junior high schools of grades 7, 8 and 9, and senior high schools of grades 10, 11 and 12. During the 1964-1965 school year there were 72 elementary schools, 16 high schools, 6 comprehensive schools, 1 college preparatory high school, 1 vocational and technical high school, and 9 special schools. This organization is shown by Stipulation 3, which establishes the following student enrollment for the 1964-65 school year:

Total in elementary schools		55,906
White pupils	34,122	
Negro pupils	21,784	
Junior high school total		17,163
White pupils	10,409	
Negro pupils	6,754	
Senior high school (including college preparatory high school)		14,691
White pupils	10,311	
Negro pupils	4,380	
		87,760

The Stipulation, largely through its Joint Exhibits, further establishes in great detail the historical background culminating in this tabulation of school population. These Exhibits not only show the general increase of the school population over the years, but establish the racial trends in that population as well. Included are figures showing the racial composition of schools which have been opened and closed and virtually all conceivable data in these areas are supplied. Other Joint Exhibits (many of which are, as hereinabove indicated, of doubtful materiality) contain masses of statistical data, maps of residential areas indicating racial compositions and records establishing facts concerning the employment and placing of Negro and white personnel. In their brief, defendants summarize this portion of the record in the following statement, which we adopt as fair:

> "The Cincinnati Public School System includes a number of schools which are attended almost entirely by Negro pupils, a number of schools attended en-

> tirely by white pupils, and a number of schools attended by both Negro and white pupils in various percentages of each of the races; the racial composition of each school is simply a result of the racial composition of the neighborhoods which they serve."

The Stipulation then goes on to establish, again largely through its Joint Exhibits, vast masses of factual material concerning record-keeping practices, curriculum programs and the results of extensive pupil testing operations. To some extent overlapping the areas just mentioned, other Joint Exhibits deal with aspects of many of the individual schools, and with such matters as transportation, the use of temporary buildings, attendance zone patterns, and changes, and generally allied matters. The second phase of plaintiffs' case consisted of the testimony of experts testifying almost exclusively on the basis of the information provided by the Stipulation. Defendants' summary of this phase, which again is adopted as fair, is as follows:

> "A professor of Education from Antioch College and a professor of Sociology from Washington University, St. Louis, both expressed the opinion that 'a racially unbalanced school seriously affects a child's ability to learn.' (T. 371)"

It is the contention of the defendants, and this is supported by the Stipulation, that in the 78 years since segregation was abolished in Ohio in 1887 (84 Ohio Laws 34; *Board of Education* v. *State*, 45 Ohio St. 555 (1888)), Negro students have attended the neighborhood schools on the same basis as white students. The defendant Board has always operated its schools under what is commonly referred to as the "neighborhood plan," which is provided for by Ohio Revised Code, Section 3313.48, which provides:

"The board of education of each city, exempted village, and local school district shall provide for the free education of the youth of school age within the district under its jurisdiction, *at such places as will be most convenient for the attendance of the largest number thereof.*" (Emphasis supplied.)

While maintaining that race had not been considered in the selection of sites or the designation of attendance zones theretofore, the Board adopted the following resolution as a statement of policy March 9th, 1964, (Stipulation 11):

"11. *Defendants' Policy Statement*: On the 9th day of March, 1964 the defendants agreed on a policy as a guide to officers and employees of the Board in selection of sites for schools, establishment of attendance area boundary lines and assignment of pupils. This policy is as follows:

"(1) As a matter of policy, the Board would like to avoid predominantly Negro schools to the extent that the Board has any control over the causes which create such predominance. But in exercising any control in this area the Board will not deviate from the long established neighborhood school plan or the requirement of Section 3313.48 R.C. that schools be located where they will be most convenient for the largest number of students.

"The Board is willing to make race of students one of the elements to be considered in the establishment of school attendance zone lines so long as this can be done consistently with the neighborhood school policy, the requirements of Sec. 3313.48, and the numerous factors which have always been considered in establishing such zone lines as — safety of children, travel distance and capacity of school.

"(2) The Board does not accept the concept of de

> facto segregation and will not agree to any proposal to bus students, to transfer classes or any other program to attempt to balance races as such."

The basic issue in this case is perhaps more clearly stated in the concluding paragraph of this policy statement than anywhere else. The gauntlet is clearly therein thrown down, and we turn to a consideration of whether on the case presented by plaintiffs this Court has either the right or the duty to enjoin establishment of any program "to attempt to balance races" in the subject school system.[6]

In a case involving similar issues, a colleague in this Circuit has recently recognized the well established principle that ". . . public officials are presumed to have properly discharged their duties." (*Craggett* v. *Board of Education of Cleveland,* 234 F. Supp. 381, 386 (N.D. Ohio 1964, Kalbfleisch, J.)). In support of that proposition, Judge Kalbfleisch cited the following: *U. S.* v. *Chemical Foundation, Inc.,* 272 U.S. 1 (1926); *In re State Thread Co.,* 126 F.2d 296 (6th Cir. 1942); and *Donaldson* v. *U. S.,* 264 F. 2d 804 (6th Cir. 1959). This proposition has also been in part at least the basis of determinations sustaining school boards in *Bell* v. *School, City of Gary, Indiana,* 213 F. Supp. 819 (N.D. Ind.), aff'd, 324 F.2d 209 (7th Cir.), cert. denied, 377 U.S. 924 (1963) (Plaintiffs' contend this case to have been "wrongly decided."); *Downs* v. *Board of Education,* 336 F.2d 988 (10th Cir. 1964), cert. denied, 380 U.S. 914 (1965); *Lynch* v. *Kenston School Dist.,* 229 F. Supp. 740 (N.D. Ohio E.D. 1964), (appeal to 6th Circuit Court of Appeals dismissed by plaintiffs-appellants

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[6] At one of the several points at which plaintiffs offer definitions of issues, the following appears (Brief, p. 56): "The issue is whether racial imbalance should be eliminated where it can be done in conformity with sound educational procedures."

July 2nd, 1965); *Northcross* v. *Board of Education*, 333 F. 2d 661 (6th Cir.), cert. denied, 370 U.S. 944 (1964); and *Springfield School Committee* v. *Barksdale*, 237 F. Supp. 543 (D.C. Mass.), rev'd, — F.2d — (1st Cir. Court of Appeals, No. 6481, decided July 12th, 1965).

A careful study of these cases, even read in the light of plaintiffs' arguments and giving special attention to the portions of the opinions on which plaintiffs place emphasis, fails to indicate more than the fact that the courts are giving recognition of the growing awareness of all men of the need to end discrimination in educational as in all other areas. In the present case the moot evidence of the Stipulation and Joint Exhibits alone would have established the increasing tempo of this trend, but plaintiffs added strongly to this showing by their cross-examination of individual defendants. Without exception, in spite of plaintiffs' repeated reference to them as "adverse," these witnesses demonstrated full awareness of and sympathy toward the problems complained of, as well as a knowledge of the intensification of their legal obligation to perform their moral duty in this regard. It would be obtuse in the extreme not to recognize that this action, which would scarce have been given serious attention a decade or two ago, is a product of its times. Indeed, plaintiffs themselves indicate such recognition when they refer to the ". . . changing constitutional interpretations of the Fifth and Fourteenth Amendments to the United States Constitution, as well as provisions of applicable state laws." (Plaintiffs' Brief, p. 4.) Beyond doubt, the courts will not stand idly by and await change by attrition if legal and constitutional rights are shown to have been denied, but in the absence of clear evidence of such denial it is not for the judicial system to be the initiating factor in sociological reform.

Reference has hereinabove been made to the extent to which this case has been prepared, and notation is made of the fact that plaintiffs have had unrestricted access to all of defendants' files and records for some two and a half years. Their failure to produce evidence to establish a policy of segregation or gerrymandering on the part of defendants strongly suggests that such practices have not been engaged in. It is here found that plaintiffs have failed to establish a deprivation of rights under the law or under the Constitution of the United States by the requisite degree of proof and that they are therefore not entitled to the relief prayed for in the Amended Complaint. Rule 41 (b), Federal Rules of Civil Procedure.

Specific comment should be made concerning two other contentions of the plaintiffs and defendants respectively. First, the conclusion here reached applies as well to plaintiffs' rights under Title 42, United States Code, Section 1983 as to their rights under the Constitution. Second, we do not reach the defense of defendants concerning plaintiffs' alleged failure to exhaust administrative remedies.

The facts are found to be as hereinabove indicated, and this opinion is filed as the Court's findings and conclusions in compliance with Rule 52 (a), Federal Rules of Civil Procedure. An order in conformity herewith may be presented.